

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TARA BENNETT and EDWARD POLHILL, individually and on behalf of all others similarly situated,

Plaintiffs,

T-MOBILE USA, INC.

Defendant.

CASE NO. 2:22-cv-01805-LK

**ORDER GRANTING MOTION TO
COMPEL ARBITRATION AND
STAY CASE**

This matter comes before the Court on Defendant T-Mobile USA, Inc.’s Motion to Compel Arbitration and Stay Case. Dkt. No. 14. Plaintiffs Tara Bennett and Edward Polhill oppose the motion. Dkt. Nos. 20, 28. For the reasons stated herein, the Court grants T-Mobile’s motion.¹

I. BACKGROUND

Plaintiffs Tara Bennett and Edward Polhill initiated this putative class action seeking relief “on behalf of all T-Mobile customers [who] have been the victim of SIM swap fraud.” Dkt. No. 1

¹ Because the Court can decide the matter based on the parties' filings, it denies T-Mobile's request for oral argument.

1 at 1, 5.² A SIM-swap is a form of “account takeover fraud” whereby a third party “is allowed to
 2 transfer access to a customer’s wireless phone number from the customer’s registered ‘subscriber
 3 identity module’ card (or ‘SIM card’) to a SIM card controlled by the third party.” Dkt. No. 1 at 3
 4 (footnote omitted); *see id.* at 11–12. As a result of T-Mobile’s alleged failure to prevent third
 5 parties from gaining access to customer information in this fashion, Plaintiffs allege that they “have
 6 lost millions of dollars” and that “T-Mobile customers continue to suffer repeated instances of
 7 identity theft.” *Id.* at 2; *see also id.* at 4, 18–21. On behalf of themselves and a putative class,
 8 Plaintiffs assert six causes of action under federal statute and state common law and request
 9 monetary, injunctive, and declaratory relief, including a judgment declaring that T-Mobile’s
 10 arbitration clause is unenforceable. *Id.* at 26–44.³

11 T-Mobile maintains that Plaintiffs’ claims are subject to mandatory arbitration. Dkt. No.
 12 14 at 8; *see* Dkt. No. 26 at 3. However, in its initial motion to compel arbitration and stay the case,
 13 T-Mobile noted that it lacked the necessary information to confirm Bennett’s identity as a T-
 14 Mobile customer. Dkt. No. 14 at 9 & n.2. Accordingly, despite contending that both Polhill and
 15 Bennett were required to arbitrate their claims pursuant to applicable terms and conditions
 16 (“T&Cs”), *id.* at 9, 26, T-Mobile acknowledged that it had not been able to locate Bennett’s
 17 account information to “identify the specific arbitration agreements [she] entered into,” *id.* at 26;
 18 *see* Dkt. No. 16 at 1–2. T-Mobile therefore asked the Court either to compel Bennett to arbitrate
 19 her claims for the same reasons as Polhill, or alternatively, to compel Bennett to provide it with
 20

21 ² A third named Plaintiff, David Garcia, voluntarily dismissed his claims against T-Mobile. Dkt. No. 25.

22 ³ Plaintiffs’ six causes of action are as follows: (1) declaratory relief under the Declaratory Judgment Act, 28
 23 U.S.C. § 2201, as to the validity of T-Mobile’s arbitration agreement, Dkt. No. 1 at 26–28; (2) violations of the Federal
 24 Communications Act, 47 U.S.C. § 151 *et seq.*, and its corresponding regulations, Dkt. No. 1 at 28–33; (3) negligence,
id. at 33–36; (4) negligent hiring, retention, and supervision, *id.* at 36–38; (5) breach of contract and the implied
 covenant of good faith and fair dealing, *id.* at 38–40; and (6) violations of the Computer Fraud and Abuse Act, 18
 U.S.C. § 1030, Dkt. No. 1 at 40–41.

1 identifying information such as her billing account number or telephone number. Dkt. No. 14 at
 2 26; *see also* Dkt. No. 21 at 6, 17.

3 On May 11, 2023, the Court deferred ruling on the portion of T-Mobile’s motion seeking
 4 to compel arbitration and stay the case and granted the portion of its motion seeking to compel
 5 discovery, ordering Plaintiffs to provide T-Mobile with the billing account number(s) and
 6 telephone number(s) for Bennett. Dkt. No. 24 at 4. The Court further ordered the parties to file
 7 supplemental briefs following this limited discovery. *Id.* at 4–5. Thereafter, the parties filed
 8 supplemental briefs regarding Bennett’s purported agreement with T-Mobile. Dkt. Nos. 26, 28.
 9 The Court also subsequently ordered T-Mobile to provide charts comparing the material provisions
 10 in each version of the Metro and T-Mobile T&Cs relevant to this dispute and granted both parties
 11 the opportunity to address whether any differences in the T&Cs might bear on their dispute. Dkt.
 12 No. 29; *see also* Dkt. Nos. 30, 33–35 (the parties’ responses).⁴

13 Based on the current record, the Court provides a brief overview of Bennett’s and Polhill’s
 14 alleged agreements with T-Mobile.

15 **A. Bennett and T-Mobile**

16 1. Bennett’s T-Mobile Account

17 As part of its supplemental briefing, T-Mobile submitted a declaration of T-Mobile’s
 18 records custodian, Christopher Muzio, indicating that Bennett’s phone number was activated with
 19 T-Mobile on or about May 20, 2019, under an account opened in 2016 by Diego Szteinhandler.
 20 Dkt. No. 27 at 2; *see also id.* (“T-Mobile’s records reflect that Mr. Szteinhandler added Tara
 21

22 ⁴ The parties’ responses to the Court’s order mainly rehash their prior arguments on the pending motion rather than
 23 analyze the import of potential discrepancies in the applicable T&Cs. *See generally* Dkt. Nos. 33–34. Although other
 24 arguments could have been made, the Court follows the principle of party representation and relies on the parties’
 framing of the issues. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579, (2020); *see also Todd R. v. Premera*
Blue Cross Blue Shield of Alaska, 825 F. App’x 440, 442 (9th Cir. 2020). The Court has thoroughly reviewed each of
 the parties’ submissions in deciding this motion.

1 Bennett as an authorized user on the Szteinhandler Account on February 22, 2022.”); Dkt. No. 27-
 2 1 at 2. T-Mobile also submitted a signed receipt for an Apple iPhone associated with Bennett’s
 3 number purchased in a T-Mobile store in New York City, as well as a signed Equipment
 4 Installment Plan (“EIP”) for the device, both of which included notice of the T&Cs and arbitration.
 5 Dkt. No. 27 at 3–4; Dkt. No. 27-6 at 2–3 (signed iPhone receipt); Dkt. No. 27-7 at 2–10 (signed
 6 EIP).

7 2. T-Mobile’s T&Cs

8 Though T-Mobile updated its T&Cs at least three times since Bennett began using her
 9 phone line, Muzio declares that “the arbitration provisions have not changed in a way material to
 10 this dispute.” Dkt. No. 27 at 3; *see* Dkt. Nos. 27-1–27-5. In its supplemental briefing, T-Mobile
 11 cites to the March 1, 2021 version of the T&Cs “[f]or convenience” and because they were “the
 12 latest version before this action was initiated.” Dkt. No. 26 at 4 n.1; *see* Dkt. No. 27-5 at 2–34;
 13 Dkt. No. 34 at 6–7 (summarizing the throughlines of the various version of the T-Mobile T&Cs).
 14 The March 2021 version of the T&Cs states that customers can accept the terms of the agreement
 15 by taking any number of actions:

16 **HOW DO I ACCEPT THESE T&CS?**

17 You accept these T&Cs by doing any of the following things:

- 18 • giving us a written or electronic signature or confirmation, or telling us
 orally that you accept;
- 19 • activating, using or paying for the Service or a Device; or
- 20 • opening the Device box.

21 If you don’t want to accept these T&Cs, don’t do any of these things.

22 Dkt. No. 27-5 at 2–3. The T&Cs also contain dispute resolution and arbitration sections that allow
 23 for a 30-day opt-out window for new customers. *Id.* at 4–7. Notably, the 2021 T-Mobile T&Cs
 state in relevant part:

24 **Dispute Resolution and Arbitration. YOU AND WE EACH AGREE THAT,**

1 **EXCEPT AS PROVIDED BELOW, ANY AND ALL CLAIMS OR
2 DISPUTES IN ANY WAY RELATED TO OR CONCERNING THE
3 AGREEMENT, OUR PRIVACY NOTICE, OUR SERVICES, DEVICES OR
4 PRODUCTS, INCLUDING ANY BILLING DISPUTES, WILL BE
5 RESOLVED BY BINDING ARBITRATION OR IN SMALL CLAIMS
6 COURT.**

7
8 *Id.* at 4–5; *see also id.* at 2 (“Thanks for choosing T-Mobile. Please read these Terms & Conditions
9 (‘T&Cs’), which contain important information about your relationship with T-Mobile, including
10 mandatory arbitration of disputes between us, instead of class actions or jury trials. You will
11 become bound by these provisions once you accept these T&Cs.”).

12 **B. Polhill and MetroPCS**

13 1. Polhill’s MetroPCS Account

14 T-Mobile provides wireless telecommunication services through several brands, including
15 prepaid wireless phone plans under the “Metro by T-Mobile” moniker following its 2013 merger
16 with MetroPCS Communications, Inc. Dkt. No. 14 at 9 & n.1; Dkt. No. 15 at 2.

17 In December 2013, Polhill activated a Metro wireless services account and made at least
18 125 payments between then and December 2022. Dkt. No. 15 at 2, 5. Muzio avers that at all
19 relevant times, Metro’s standard practice and procedure was “to provide a customer activating
20 service with information about Metro’s Terms and Conditions, including information that the
21 Terms and Conditions require arbitration of disputes, and that a customer would accept the Terms
22 and Conditions by activating, using, or paying for Metro services.” *Id.* at 3; *see also id.* at 4 (“At
23 all relevant times, it has been (and still is) Metro’s standard practice and procedure to provide
24 information about Metro’s Terms and Conditions to a customer activating service.”). More
 specifically, Metro’s standard practice and procedure in 2013 included providing a one-page sheet
 explaining relevant policies and terms (the “Metro Information Sheet”). *Id.* at 4; *see* Dkt. No. 15–
 10 at 2–3. Metro’s standard practice and procedure then (and now) also involved affixing a sticker

1 mentioning the T&Cs on Metro device boxes that must be removed in order to open the box (the
 2 “Metro Box Sticker”). Dkt. No. 15 at 4. The Metro Box Sticker states in relevant part:

3 By purchasing or opening this package, activating, using, or paying for Metro by
 4 T-Mobile service, you agree to the Metro by T-Mobile Terms and Conditions
 5 (“T&Cs”) which provide for arbitration of disputes. . . See the complete T&Cs
 with the return policy at the place of purchase if you do not agree to the T&Cs.

6 *Id.* T-Mobile claims that on five occasions between July 2018 and August 2020, Polhill received
 7 a device that would have been sealed by the Metro Box Sticker. *Id.* at 5. In addition, Metro’s
 8 standard practice and procedure is to send text messages to customers activating devices or lines
 9 notifying them of the T&Cs. *Id.* T-Mobile’s records indicate that T-Mobile sent such text messages
 10 to Polhill on at least five occasions between July 2018 and August 2020. *Id.* (describing the text
 11 message template: “[Account #]: Please pay \$[amount due] by [due date] to avoid service
 12 interruption. Metro by T-Mobile Terms & Conditions including arbitration apply. See mbyt-
 13 mo.com/terms.”).

14 For his part, Polhill claims that he has “never knowingly accepted an arbitration
 15 agreement” with Metro or T-Mobile and that no one in the Metro store informed him that there
 16 were T&Cs on a website with an arbitration clause. Dkt. No. 20-1 at 2; *see also* Dkt. No. 33 at 3–
 17 4. Polhill further avers that he does not recall receiving a copy of any T&Cs or the Metro
 18 Information Sheet, or seeing the Metro Box Sticker, and that while he has received text messages
 19 mentioning the T&Cs and arbitration, he has never clicked on the link to view the T&Cs. Dkt. No.
 20 20-1 at 2–3.

21 2. MetroPCS’s T&Cs

22 Although Metro updated its T&Cs eight times between 2013 and 2022, Muzio attests that
 23 “the arbitration provisions have not changed in a way material to this dispute.” *Id.* at 3–4; *see* Dkt.
 24

Nos. 15-1–15-9.⁵ In its motion, T-Mobile cites to the October 8, 2018 T&Cs “[f]or convenience,” which Plaintiffs do not challenge or dispute. Dkt. No. 14 at 10 n.3; *see* Dkt. No. 15-6 at 2–8; *see generally* Dkt. Nos. 26, 28, 33. However, the March 2021 T&Cs are the version of the Metro T&Cs that were in place when the lawsuit was filed and that govern here. Dkt. No. 34 at 3. That iteration of the T&Cs substantively mirrors the language in the relevant T-Mobile T&Cs described above. *Compare* Dkt. No. 15-9 at 2–6, *with* Dkt. No. 27-5 at 2–7.⁶ In addition, Muzio states that Metro’s customer records reflect opt-out notices, and that Polhill has never provided notice that he would like to opt out of the arbitration agreement. Dkt. No. 15 at 6.

II. DISCUSSION

The two narrow issues before the Court are (1) did the parties form an agreement to arbitrate; and (2) if so, who decides arbitrability: the Court or an arbitrator? For the reasons laid out below, the Court concludes that the parties formed an agreement to arbitrate that delegates the question of arbitrability to an arbitrator.

A. Jurisdiction

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiffs assert claims under the Federal Communications Act and the Computer Fraud and Abuse Act, *see* Dkt. No. 1 at 28–33, 40–41. The Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a) because the dispute is between citizens of different states and the amount in controversy, exclusive of costs and interests, exceeds \$75,000. T-Mobile is a Delaware corporation with its

⁵ As the Court noted in its November 16, 2023 order, there appear to be “notable differences between the 2021 T&Cs and prior versions—including the 2018 Metro T&Cs[.]” Dkt. No. 29 at 3. Indeed, some contract language that T-Mobile quoted in support of its arguments is nowhere to be found in the T&Cs that T-Mobile contends were in force at the time Polhill experienced the SIM swap and sued. *Id.* The Court cautions T-Mobile that future misrepresentations of the evidence may result in sanctions.

⁶ T-Mobile states that it revised the Metro T&Cs to conform with the language and format of the T-Mobile T&Cs in March 2021. Dkt. No. 34 at 4 n.1.

1 principal place of business in Bellevue, Washington, whereas Bennett and Polhill are citizens of
 2 Texas and Michigan, respectively. *Id.* at 5–6.

3 **B. Legal Standard**

4 Under the Federal Arbitration Act (“FAA”), courts must enforce a commercial agreement
 5 to “arbitrat[e] a controversy thereafter arising out of such contract[.]” 9 U.S.C. § 2. “A party
 6 aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written
 7 agreement for arbitration may petition” the district court for “an order directing that such
 8 arbitration proceed in the manner provided for in such agreement.” *Id.* § 4. The FAA further
 9 provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such
 10 grounds as exist at law or in equity for the revocation of any contract[.]” *Id.* § 2. This provision
 11 reflects “both a liberal federal policy favoring arbitration, and the fundamental principle that
 12 arbitration is a matter of contract.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)
 13 (cleaned up).

14 When deciding whether to compel arbitration, a court must generally “determine two
 15 ‘gateway’ issues: (1) whether there is an agreement to arbitrate between the parties; and
 16 (2) whether the agreement covers the dispute.” *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th
 17 Cir. 2015) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)); *accord Revitch*
 18 v. *DIRECTV, LLC*, 977 F.3d 713, 716 (9th Cir. 2020). “However, these gateway issues can be
 19 expressly delegated to the arbitrator where ‘the parties *clearly and unmistakably* provide
 20 otherwise.’” *Brennan*, 796 F.3d at 1130 (quoting *AT & T Techs., Inc. v. Commc’ns Workers of*
 21 *Am.*, 475 U.S. 643, 649 (1986)); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938,
 22 944 (1995) (courts should not assume, absent clear and unmistakable evidence, that the parties
 23 agreed to arbitrate arbitrability). Where, as here, the party opposing arbitration challenges both the
 24 formation of an agreement to arbitrate and the enforceability of a delegation clause, the Ninth

1 Circuit has outlined the proper order of operations:

2 First, a court must resolve any challenge that an agreement to arbitrate was never
 3 formed, even in the presence of a delegation clause. Next, a court must also resolve
 4 any challenge directed specifically to the enforceability of the delegation clause
 5 before compelling arbitration of any remaining gateway issues of arbitrability.
 Finally, if the parties did form an agreement to arbitrate containing an enforceable
 delegation clause, all arguments going to the scope or enforceability of the
 arbitration provision are for the arbitrator to decide in the first instance.

6 *Caremark, LLC v. Chickasaw Nation*, 43 F.4th 1021, 1030 (9th Cir. 2022). Thus, “a court ‘should
 7 order arbitration of a dispute only where the court is satisfied that neither the formation of the
 8 parties’ arbitration agreement nor (absent a valid provision specifically committing such disputes
 9 to an arbitrator) its enforceability or applicability to the dispute is in issue.’” *Id.* (emphasis omitted)
 10 (quoting *Granite Rock Co. v. Int’l Bhd. Of Teamsters*, 561 U.S. 287, 299 (2010)).

11 The party seeking to compel arbitration “bears the burden of proving the existence of an
 12 agreement to arbitrate by a preponderance of the evidence.” *Norcia v. Samsung
 13 Telecommunications Am., LLC*, 845 F.3d 1279, 1283 (9th Cir. 2017) (internal quotation marks
 14 omitted) (quoting *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014)). When
 15 deciding whether an agreement to arbitrate exists in the context of a motion to compel arbitration,
 16 district courts apply a “standard similar to the summary judgment standard of Federal Rule of Civil
 17 Procedure 56.” *S.S. by & through Stern v. Peloton Interactive, Inc.*, 566 F. Supp. 3d 1019, 1044
 18 (S.D. Cal. 2021) (cleaned up). While “[a] party may object that the material cited to support or
 19 dispute a fact cannot be presented in a form that would be admissible in evidence,” the Court will
 20 consider the substance of evidence so long as it may be admissible in another form at trial. *Id.*
 21 (quoting Fed. R. Civ. P. 56(c)(2)); *see also, e.g., Harlow v. Chaffey Cnty. Coll. Dist.*, No. 21-
 22 55349, 2022 WL 4077103, at *1 (9th Cir. Sept. 6, 2022); *Mitchell v. Ecolab, Inc.*, No. 1:22-CV-
 23 01088-EPG, 2023 WL 2666391, at *4 (E.D. Cal. Mar. 28, 2023).

1 **C. T-Mobile's Motion to Compel Arbitration**

2 T-Mobile asserts that Plaintiffs each agreed to T&Cs as part of their mobile phone services
 3 that require them to arbitrate the claims alleged in the complaint, and that this action should
 4 therefore be stayed pending arbitration. *See* Dkt. No. 14 at 9–13, 16–20, 25–27; Dkt. No. 21 at 7–
 5 11, 17; Dkt. No. 26 at 4–7; Dkt. No. 34 at 3–7. T-Mobile also argues that the parties agreed to
 6 delegate all disputes as to the scope, validity, and enforceability of the respective arbitration
 7 agreements to the arbitrator in the first instance. Dkt. No. 14 at 20–26; Dkt. No. 21 at 11–16; Dkt.
 8 No. 26 at 7–8.

9 Plaintiffs oppose T-Mobile's motion in its entirety. *See generally* Dkt. Nos. 20, 28. They
 10 claim that T-Mobile has failed to meet its burden of showing the formation of an agreement to
 11 arbitrate between Metro and Polhill, Dkt. No. 20 at 7–14; Dkt. No. 33 at 3–4, and that the relevant
 12 arbitration clause does not cover Bennett's claims because she is not a signatory to T-Mobile's
 13 T&Cs, Dkt. No. 28 at 6–8; Dkt. No. 33 at 3. Plaintiffs further argue that there is no clear and
 14 unmistakable evidence of delegation in the purported agreements to arbitrate, Dkt. No. 20 at 16–
 15 18 (Polhill); Dkt. No. 28 at 3–5 (Bennett), and that these agreements, including the delegation
 16 clauses, are procedurally and substantively unconscionable, Dkt. No. 20 at 14–16, 18–19 (Polhill);
 17 Dkt. No. 28 at 5–6 (Bennett).⁷

20 ⁷ In addition, Plaintiffs argue that T-Mobile waived its right to enforce the arbitration clauses in this case because it
 21 apparently did so in a different lawsuit. Dkt. No. 20 at 19–20; Dkt. No. 28 at 8; Dkt. No. 33 at 4–5. That argument
 22 fails, however, as Plaintiffs provide no authority supporting the proposition that T-Mobile's conduct as a defendant in
 23 another matter can constitute waiver of its rights in *this* case. Moreover, the T&Cs expressly anticipate such a scenario,
 24 further undermining Plaintiffs' assertion that T-Mobile's prior conduct in a collateral matter is inconsistent with its
 right to arbitrate in the instant action. *See* Dkt. No. 15-9 at 6 (“If we don't enforce our rights under any provisions of
 the Agreement in one instance, that doesn't mean we won't or can't enforce those rights in any other instance.”); Dkt.
 No. 27-5 at 32 (same); *cf. Cage v. Cach, LLC*, No. C13-01741-RSL, 2014 WL 2170431, at *1 (W.D. Wash. May 22,
 2014). Furthermore, offensive non-mutual collateral estoppel can apply only where a defendant seeks to relitigate an
 issue which “the defendant previously *litigated and lost* against another plaintiff.” *Appling v. State Farm Mut. Auto.*
Ins. Co., 340 F.3d 769, 775 (9th Cir. 2003) (emphasis added).

1 1. T-Mobile Has Sufficiently Established That Bennett Agreed to Arbitrate

2 2. (a) *New York Law Applies*

3 “In determining whether a valid arbitration agreement exists, federal courts ‘apply ordinary
 4 state-law principles that govern the formation of contracts.’” *Nguyen v. Barnes & Noble Inc.*, 763
 5 F.3d 1171, 1175 (9th Cir. 2014) (quoting *First Options*, 514 U.S. at 944). Such agreements may
 6 be invalidated by “generally applicable contract defenses, such as fraud, duress, or
 7 unconscionability[.]” *Concepcion*, 563 U.S. at 339 (quotation marks and citation omitted); *see* 9
 8 U.S.C. § 2. The parties agree that New York law applies to the question of whether Bennett formed
 9 an agreement to arbitrate. *See* Dkt. No. 26 at 4; Dkt. No. 28 at 3. But the Court must still determine
 10 whether to apply the law of Washington, the forum state, or the law of New York, based on the T-
 11 Mobile T&Cs’ choice of law provision indicating that the agreement is governed by “the laws of
 12 the state or jurisdiction in which your billing address in our records is located.” Dkt. No. 27-5 at
 13 30.

14 Federal courts sitting in diversity apply the substantive laws of the forum state, *First*
 15 *Intercontinental Bank v. Ahn*, 798 F.3d 1149, 1153 (9th Cir. 2015), as do courts presiding over
 16 federal question actions involving supplemental jurisdiction over state law claims, *Paulsen v. CNF*
 17 *Inc.*, 559 F.3d 1061, 1080 (9th Cir. 2009). Washington’s choice of law rules require this Court to
 18 assess: (1) whether there is an actual conflict of laws between the two proposed states, and if so,
 19 (2) whether the choice of law provision in the relevant agreement is effective. *See, e.g., Gierke v.*
 20 *Allstate Prop. & Cas. Ins. Co.*, No. C19-0071-JLR, 2019 WL 4849494, at *3 (W.D. Wash. Oct. 1,
 21 2019) (citing *Erwin v. Cotter Health Ctrs.*, 167 P.3d 1112, 1120 (Wash. 2007)). Washington courts
 22 will enforce a choice of law provision unless a three-part test is satisfied: (1) “without the
 23 provision, Washington law would apply” under section 188 of the Restatement (Second) of
 24 Conflicts of Laws; (2) “the chosen state’s law violates a fundamental public policy of

1 Washington”; and (3) “Washington’s interest in the determination of the issue materially
 2 outweighs the chosen state’s interest.” *McKee v. AT & T Corp.*, 191 P.3d 845, 851 (Wash. 2008).

3 Here, the Court finds that there is no actual conflict between New York and Washington
 4 law regarding the formation of a contract that necessitates the application of Washington law in
 5 this instance. *See, e.g., Starke v. SquareTrade, Inc.*, 913 F.3d 279, 290 n.7 (2d Cir. 2019). The
 6 Court therefore applies New York law pursuant to the T&Cs.

7 (b) *Bennett is Bound by T-Mobile’s T&Cs*

8 T-Mobile argues, and Plaintiffs do not appear to dispute, that Szteinhendler entered into a
 9 binding agreement to arbitrate disputes by signing the relevant account agreements and the receipt
 10 for the device purchased for Bennett’s line, each of which incorporated the T-Mobile T&Cs. Dkt.
 11 No. 26 at 5; *see* Dkt. No. 27 at 2–4; Dkt. No. 27-1 at 2 (signed service terms); Dkt. No. 27-6 at 2–
 12 3 (signed iPhone receipt); Dkt. No. 27-7 at 2–10 (signed EIP). To the extent Bennett argues that
 13 she is not bound by the T-Mobile T&Cs because *she* did not sign the relevant agreements, Dkt.
 14 No. 28 at 4, 6; Dkt. No. 33 at 3, “[f]ederal courts have recognized that the obligation to arbitrate
 15 under the FAA does not attach only to one who has personally signed the arbitration provision.”
 16 *Nguyen*, 763 F.3d at 1179 (citing *Thomson-CSF, S.A. v. Am. Arb. Ass’n*, 64 F.3d 773, 776 (2d Cir.
 17 1995)). “Instead, a non-signatory to an arbitration agreement may be compelled to arbitrate where
 18 the nonsignatory knowingly exploits the benefits of the agreement and receives benefits flowing
 19 directly from the agreement.” *Id.* (cleaned up); *see also Am. Bureau of Shipping v. Tencara*
 20 *Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) (“A party is estopped from denying its
 21 obligation to arbitrate when it receives a ‘direct benefit’ from a contract containing an arbitration
 22 clause.”); *Nicosia v. Amazon.com, Inc.*, 384 F. Supp. 3d 254, 272–75 (E.D.N.Y. 2019) (discussing
 23 traditional equitable estoppel and “direct benefits estoppel” whereby “a nonsignatory may be
 24 compelled to arbitrate where it knowingly accepts the benefits of an agreement with an arbitration

1 clause.” (cleaned up)), *aff’d*, 815 F. App’x 612 (2d Cir. 2020); *Belzberg v. Verus Invs. Holdings*
 2 *Inc.*, 999 N.E.2d 1130, 1134 (N.Y. 2013).

3 T-Mobile’s records show that regular monthly payments have been made on
 4 Szteinhandler’s account from the time Bennett’s phone line was activated in May 2019 through at
 5 least May 2023, Dkt. No. 27 at 5, and Bennett alleges in the complaint that she uses her T-Mobile
 6 line, Dkt. No. 1 at 18–19. Thus, because Szteinhandler opened and paid for Bennett’s line of
 7 service, and Bennett received a “direct benefit” flowing from the agreement between Szteinhandler
 8 and T-Mobile, i.e., the use of her phone line and device, the Court concludes that she is bound by
 9 the T-Mobile T&Cs. *See Middleton v. T-Mobile US, Inc.*, No. 20-CV-3276 (NGG) (JRC), 2022
 10 WL 16828226, at *9 (E.D.N.Y. Aug. 24, 2022); *Nicosia*, 384 F. Supp. 3d at 275.

11 2. The Scope, Validity, and Enforceability of the T-Mobile Arbitration Agreement Must
First Be Decided by an Arbitrator

12 A delegation clause is a clause within an arbitration provision that delegates to the
 13 arbitrator threshold questions of arbitrability, including whether the arbitration provision itself is
 14 enforceable. *Caremark*, 43 F.4th at 1029. After a court resolves challenges to the formation of an
 15 agreement to arbitrate, it must resolve challenges “directed specifically to the enforceability of the
 16 delegation clause[.]” *Id.* at 1030. And in order for a federal court to address an unconscionability
 17 challenge in the face of a delegation clause, a litigant opposing arbitration must specifically “argue
 18 that the agreement to delegate to an arbitrator his unconscionability claim was *itself*
 19 unconscionable.” *Brennan*, 796 F.3d at 1133 (citing *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63,
 20 74 (2010)). The Ninth Circuit recently clarified that “to sufficiently challenge a delegation
 21 provision, the party resisting arbitration must specifically reference the delegation provision and
 22 make arguments challenging it,” but that “a court need not . . . first evaluate the substance of the
 23 challenge.” *Bielski v. Coinbase, Inc.*, 87 F.4th 1003, 1011 (9th Cir. 2023). In addition, “a party
 24

1 may use the same arguments to challenge both the delegation provision and arbitration agreement,
 2 so long as the party articulates why the argument invalidates each specific provision.” *Id.*

3 (a) *Clear and Unmistakable Evidence of Delegation in T-Mobile’s T&Cs*

4 Plaintiffs argue that there is no clear and unmistakable evidence of delegation in the T-
 5 Mobile T&Cs, and that any such purported agreement is unconscionable. Dkt. No. 28 at 4–6; *see*
 6 also Dkt. No. 1 at 27 (“[T]o the extent the Terms of Service expressly or impliedly incorporates a
 7 ‘delegation clause’ that ‘decides who decides’ disputes, such delegation clause imposes an
 8 onerous, unfair, and unusual burden on users because the delegation clause itself is subject to the
 9 multi-step, onerous dispute resolution process in the Terms of Service.”). However, despite
 10 Plaintiffs’ contention to the contrary, the T-Mobile T&Cs contain clear and unmistakable evidence
 11 that disputes regarding the scope and enforceability of the arbitration clause have been delegated
 12 to an arbitrator to decide.

13 First, the T-Mobile T&Cs include notice of mandatory arbitration at the top of the
 14 agreement, as well as the following broad language regarding dispute resolution: **“ANY AND**
ALL CLAIMS OR DISPUTES IN ANY WAY RELATED TO OR CONCERNING THE
AGREEMENT, OUR PRIVACY NOTICE, OUR SERVICES, DEVICES OR PRODUCTS,
INCLUDING ANY BILLING DISPUTES, WILL BE RESOLVED BY BINDING
ARBITRATION OR IN SMALL CLAIMS COURT.” Dkt. No. 27-5 at 2, 4–5. Second, the
 19 T&Cs incorporate by reference the rules of the American Arbitration Association (“AAA”). The
 20 T-Mobile T&Cs expressly provide that “[t]he arbitration of all disputes will be administered by
 21 the AAA under its Consumer Arbitration Rules in effect at the time the arbitration is commenced,
 22 except to the extent any of those rules conflicts [sic] with our agreement in these T&Cs, in which
 23 case these T&Cs will govern.” *Id.* at 6; *see* Dkt. No. 16-1 at 18 (Rule 14(a) of the AAA’s current
 24 Consumer Arbitration Rules providing that “[t]he arbitrator shall have the power to rule on his or

1 her own jurisdiction, including any objections with respect to the existence, scope, or validity of
 2 the arbitration agreement or to the arbitrability of any claim or counterclaim.”).

3 The Ninth Circuit has held that incorporation of the AAA rules by reference often
 4 “constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate
 5 arbitrability.” *Brennan*, 796 F.3d at 1130; *see also G.G. v. Valve Corp.*, 799 F. App’x 557, 558
 6 (9th Cir. 2020). The Ninth Circuit has further expressed that such holding “should not be
 7 interpreted to require that the contracting parties be sophisticated or that the contract be
 8 ‘commercial’ before a court may conclude that incorporation of the AAA rules constitutes ‘clear
 9 and unmistakable’ evidence of the parties’ intent.” *Brennan*, 796 F.3d at 1130.⁸ Indeed, “[t]he
 10 parties’ degree of sophistication does not change th[e] conclusion” that they clearly and
 11 unmistakably agreed to arbitrate questions of arbitrability in an arbitration agreement that
 12 incorporates AAA rules “because, under Washington law, ‘[c]ourts presume that parties to an
 13 agreement have read all parts of the entire contract and intend what is stated in its objective
 14 terms[.]’” *G.G.*, 799 F. App’x 557 at 558 (quoting *W. Coast Stationary Eng’rs Welfare Fund v.*
 15 *City of Kennewick*, 694 P.2d 1101, 1104 (Wash. Ct. App. 1985)); *see also Moreno v. T-Mobile*
 16 *USA, Inc.*, No. 2:22-CV-00843-JHC, 2023 WL 401913, at *4–5 (W.D. Wash. Jan. 25, 2023). So
 17 too in New York. *Marine Midland Bank, N.A. v. Embassy E., Inc.*, 553 N.Y.S.2d 767, 769 (N.Y.
 18 App. Div. 1990) (“[T]he law presumes that one who is capable of reading has read the document
 19 which he has executed[.]”).

20 Here, the “arbitration agreement is broad and expresses the intent to arbitrate all aspects of
 21 all disputes.” *DDK Hotels, LLC v. Williams-Sonoma, Inc.*, 6 F.4th 308, 318–19 (2d Cir. 2021).
 22 “[T]his—coupled with incorporation of rules that expressly empower an arbitrator to decide issues

23
 24 ⁸ Plaintiffs do not provide any characterization of Bennett’s sophistication level, but the Court presumes for the sake
 of argument that she is an average consumer.

1 of arbitrability—constitutes clear and unmistakable evidence of the parties’ intent to delegate the
 2 question of arbitrability to the arbitrator.” *Id.* at 319; *see also, e.g., Lewis v. Samsung Elecs. Am.,*
 3 *Inc.*, No. 1:22-CV-10882 (JLR), 2023 WL 7623670, at *10–11 (S.D.N.Y. Nov. 14, 2023); *Kassim*
 4 *v. CVS Albany, LLC*, No. 21-CV-2927 (PKC) (TAM), 2022 WL 4357456, at *12 (E.D.N.Y. Sept.
 5 20, 2022); *Esquer v. Educ. Mgmt. Corp.*, 292 F. Supp. 3d 1005, 1012–13 (S.D. Cal. 2017); *Capelli*
 6 *Enter., Inc. v. Fantastic Sams Salons Corp.*, No. 5:16-CV-03401-EJD, 2016 WL 4492588, at *4–
 7 5 (N.D. Cal. Aug. 26, 2016).

8 To avoid this result, Plaintiffs bizarrely argue that their claims do not arise out of the T&Cs
 9 and are instead based upon T-Mobile’s alleged violations of state and federal statute, Dkt. No. 33
 10 at 2, but their complaint asserts a breach of contract claim based on the T&Cs, Dkt. No. 1 at 38–
 11 40. Regardless, where—as here—the T&Cs delegate the arbitrability question to an arbitrator, the
 12 Court “possesses no power to decide the arbitrability issue” even if it believed “that the argument
 13 that the arbitration agreement applies to a particular dispute is wholly groundless.” *Henry Schein,*
 14 *Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019).

15 Thus, “[i]n accordance with Supreme Court precedent,” the Court is required to enforce
 16 the T&Cs “‘according to their terms’ and, in the absence of some other generally applicable
 17 contract defense, such as fraud, duress, or unconscionability, let an arbitrator determine
 18 arbitrability as to all but the claims specifically exempted by the [T&Cs].” *Mohamed v. Uber*
 19 *Techs., Inc.*, 848 F.3d 1201, 1209 (9th Cir. 2016) (quoting *Rent-A-Ctr.*, 561 U.S. at 67).

20 (b) *Plaintiffs Fail to Show That the T-Mobile T&Cs’ Delegation Provision is*
 21 *Unconscionable*

22 The only remaining question with respect to Bennett is whether the delegation provision is
 23 itself unconscionable. *Brennan*, 796 F.3d at 1132. “[I]n order for a court to consider an
 24 unconscionability challenge to an arbitration provision, the challenging parties’ argument must be

1 ‘specific to the delegation provision’ in the arbitration provision.” *Thomas v. Barclays Bank Del.*,
 2 No. C20-5937-JCC-MLP, 2021 WL 9649851, at *6 (W.D. Wash. Mar. 2, 2021) (quoting *Rent-A-*
 3 *Ctr.*, 561 U.S. at 73); *see also Bielski*, 87 F.4th at 1011.

4 With respect to Bennett, Plaintiffs argue that the T-Mobile T&Cs’ arbitration clause is
 5 unconscionable, but only mention in passing the delegation clause, consistent with their position
 6 that the arbitration agreement lacks such a clause. Dkt. No. 28 at 5 (“[E]ven if there were a
 7 delegation clause found in the AAA Rules, such an arbitration agreement would be procedurally
 8 and substantively unconscionable.”). Assuming without deciding that this qualifies as a proper
 9 challenge to the delegation provision, *Bielski*, 87 F.4th at 1011, Plaintiffs do not demonstrate that
 10 the T-Mobile T&Cs’ delegation provision is so unconscionable so as to render the clause
 11 unenforceable in this case.

12 Under New York law, “a provision in an arbitration agreement is unconscionable if ‘it is
 13 so grossly unreasonable or unconscionable in the light of the mores and business practices of the
 14 time and place as to be unenforceable according to its literal terms.’” *Glover v. Bob’s Disc.*
 15 *Furniture, LLC*, 621 F. Supp. 3d 442, 449 (S.D.N.Y. 2022) (quoting *Ragone v. Atl. Video at*
 16 *Manhattan Ctr.*, 595 F.3d 115, 121 (2d Cir. 2010)). Generally, this requires a showing of both
 17 procedural and substantive unconscionability. *Id.*; *see also Mumin v. Uber Techs., Inc.*, 239 F.
 18 Supp. 3d 507, 525 (E.D.N.Y. 2017).

19 Here, Plaintiffs argue that “the arbitration clause is a contract of adhesion that gives T-
 20 Mobile a 60-day ‘free peek’ at the consumer’s claim without tolling the limitation period,” and
 21 that “T-Mobile can unilaterally change the arbitration agreement ‘at any time[.]’” Dkt. No. 28 at
 22 5. Plaintiffs also contend that the arbitration agreement is unconscionable because T-Mobile can
 23 “force the consumer to re-file his action in small claims court before an arbitrator is appointed”
 24 and because the T&Cs “limit the arbitrator’s power to award damages against T-Mobile.” *Id.* at 5–

1 6.

2 Beginning with Plaintiffs' claims of procedural unconscionability, "even if the Agreement
 3 was a form contract offered on a 'take-it-or-leave-it' basis and [defendant] refused to negotiate the
 4 Arbitration Provision, this is not sufficient under New York law to render the provision
 5 procedurally unconscionable." *Nayal v. HIP Network Servs. IPA, Inc.*, 620 F. Supp. 2d 566, 571
 6 (S.D.N.Y. 2009). "In finding contractual provisions procedurally unconscionable, courts look for
 7 high pressure commercial tactics, inequality of bargaining power, deceptive practices and language
 8 in the contract, and an imbalance in the understanding and acumen of the parties." *McDougall v.*
 9 *Samsung Elecs. Am., Inc.*, No. 23-CV-168 (LGS), 2023 WL 6445838, at *6 (S.D.N.Y. Oct. 3,
 10 2023) (cleaned up). Plaintiffs have submitted no such evidence here. *See, e.g., Perry v. MLB*
 11 *Advanced Media, L.P.*, No. CV-18-1548-PSG (GJSx), 2018 WL 5861307, at *4–6 (C.D. Cal. May
 12 30, 2018) (applying New York law and denying procedural unconscionability challenge).

13 Likewise, with respect to substantive unconscionability, "[t]he unilateral right to modify
 14 an agreement, without more, does not render the agreement unenforceable." *Nicholas v. Wayfair*
 15 *Inc.*, 410 F. Supp. 3d 448, 456 (E.D.N.Y. 2019). As for Plaintiffs' "free peek" argument, the Ninth
 16 Circuit recently considered this and several of Plaintiffs' other unconscionability arguments under
 17 California law and declined to find the relevant delegation provision unenforceable. *See Bielski*,
 18 87 F.4th at 1013–15. And New York courts have rejected similar arguments, holding that the
 19 requirement to "divulge all of [the plaintiff's] claims first to the entity against whom he/she is
 20 complaining about" is not by itself unconscionable. *Brown v. Coca-Cola Enterprises, Inc.*, No. 08-
 21 CV-3231-JFB-ETB, 2009 WL 1146441, at *9 (E.D.N.Y. Apr. 28, 2009). In addition, whatever
 22 advantage results from the ability to initiate small claims proceedings before an arbitrator is
 23 selected is a two-way street: both Bennett and T-Mobile have this right under the T&Cs. In any
 24 event, Plaintiffs have not demonstrated that Bennett is likely to be forced to incur the cost of re-

1 filing in small claims court. *See Perry*, 2018 WL 5861307, at *6; *see also M/S Bremen v. Zapata*
 2 *Off-Shore Co.*, 407 U.S. 1, 15 (1972) (a forum selection clause “should control absent a strong
 3 showing that it should be set aside,” such as a clear showing “that enforcement would be
 4 unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching”).

5 The limitation of liability clause Bennett highlights in the T-Mobile T&Cs does not
 6 mention negligence, and instead limits T-Mobile’s liability for “problems caused by” the user or
 7 by third parties, without precluding liability for negligence attributable to T-Mobile. Dkt. No. 27-
 8 5 at 32. Moreover, “there is nothing inherently suspect about a limitation of liability clause; New
 9 York courts consistently uphold them when they do not otherwise violate public policy.” *Yuille v.*
 10 *Uphold HQ Inc.*, No. 22-CV-7453 (LJL), 2023 WL 5206888, at *18 (S.D.N.Y. Aug. 11, 2023).
 11 “The parties may later regret their assumption of the risks of non-performance in this manner, but
 12 the courts let them lie on the bed they made, unless the provision is the result of unconscionable
 13 conduct or unequal bargaining power between the parties.” *Camofi Master LDC v. Coll. P’ship,*
 14 *Inc.*, 452 F. Supp. 2d 462, 478 (S.D.N.Y. 2006) (cleaned up). Plaintiffs do not point to any liability-
 15 limiting term that “is so grossly unreasonable or unconscionable in the light of the mores and
 16 business practices of the time and place as to be unenforc[ea]ble according to its literal terms.”
 17 *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10 (N.Y. 1988) (quoting *Mandel v.*
 18 *Liebman*, 303 N.Y. 88, 94 (N.Y. 1951)). And finally, the clause contains a disclaimer that it applies
 19 only “[t]o the extent permitted by law[.]” Dkt. No. 27-5 at 32.

20 Thus, the Court does not find a level of substantive unconscionability in the clauses
 21 discussed above that renders the delegation clause unenforceable. And in the absence of a
 22 sufficient showing of procedural and substantive unconscionability, the Court concludes that the
 23 delegation clause is enforceable and that Bennett must proceed to arbitration. *See, e.g., Caremark*,
 24 43 F.4th at 1029 (“Under *Rent-A-Center* . . . a valid—*i.e.*, enforceable—delegation clause commits

1 to the arbitrator nearly all challenges to an arbitration provision.” (footnote omitted)); *Rodriguez*
 2 *v. T-Mobile USA, Inc.*, No. 22-CV-00581-AJB-DEB, 2023 WL 6593786, at *3–4 (S.D. Cal. Sept.
 3 28, 2023).

4 3. T-Mobile Has Sufficiently Established That Polhill Agreed to Arbitrate

5 (a) *Michigan Law Applies*

6 Turning to Polhill, the Court again begins by applying ordinary state-law principles
 7 governing the formation of contracts to determine whether T-Mobile has sufficiently established
 8 the existence of an agreement to arbitrate. *Nguyen*, 763 F.3d at 1175. Like the T-Mobile T&Cs,
 9 the Metro T&Cs include a choice of law provision. Dkt. No. 15-9 at 6. The parties agree that
 10 Michigan law applies to the question of whether Polhill formed an agreement to arbitrate. Dkt. No.
 11 14 at 16–17; Dkt. No. 20 at 9. And the Court finds that there is no actual conflict between Michigan
 12 and Washington law regarding the formation of a contract that necessitates the application of
 13 Washington law in this instance.

14 Under Washington law, the parties must objectively manifest their mutual assent to
 15 sufficiently definite terms, and the contract must be supported by consideration. *Keystone Land &*
Dev. Co. v. Xerox Corp., 94 P.3d 945, 949 (Wash. 2004); *see also New York Life Ins. Co. v.*
Mitchell, 528 P.3d 1269, 1280 (Wash. 2023) (“[A]ll parties must have the requisite legal capacity
 17 to create a valid contract.”); *cf. Ekin v. Amazon Servs., LLC*, 84 F. Supp. 3d 1172, 1176 (W.D.
 18 Wash. 2014) (“In Washington, a contract is illusory only if it lacks all consideration and mutuality
 19 of obligation, e.g., the promisor has no obligations with regard to any parts of the contract.”)
 20 (emphasis omitted)). Under Michigan law, “[a] valid contract requires five elements: (1) parties
 21 competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of
 22 agreement, and (5) mutuality of obligation.” *AFT Mich. v. State of Michigan*, 866 N.W.2d 782,
 23 804 (Mich. 2015). The Court therefore applies Michigan law pursuant to the T&Cs. *See In re*

1 *StockX Customer Data Sec. Breach Litig.*, 19 F.4th 873, 881 n.4 (6th Cir. 2021) (applying the
 2 parties' choice of law provision); *Thomas*, 2021 WL 9649851, at *4 (same); *Schnall v. AT & T*
 3 *Wireless Servs., Inc.*, 259 P.3d 129, 131–33 (Wash. 2011) (same).

4 Plaintiffs do not dispute that Polhill and T-Mobile were competent to contract or that
 5 arbitration is a proper subject matter. Nor do Plaintiffs dispute that Polhill agreed to pay Metro for
 6 devices and cellular service. *See* Dkt. No. 20 at 10 (acknowledging that Metro and T-Mobile
 7 “reached an agreement, whether express or implied, with Mr. Polhill about his phone purchase and
 8 cellular service”). Rather, Plaintiffs argue that Polhill never accepted the arbitration agreement and
 9 that the agreement lacks mutuality of obligation. *Id.* at 10–14; *see In re StockX*, 19 F.4th at 881.
 10 Applying Michigan law pursuant to the T&Cs, the Court finds that Polhill formed an agreement
 11 to arbitrate.

12 (b) *The Muzio Declaration is Admissible*

13 The Court first addresses Plaintiffs' evidentiary challenge to Muzio's declaration. In light
 14 of the absence of a written agreement signed by Polhill, Plaintiffs challenge the admissibility of
 15 Muzio's testimony regarding Metro's standard practices and procedures as a way of proving the
 16 existence of an agreement to arbitrate. *See* Dkt. No. 20 at 7–9; *id.* at 7 (“The Muzio declaration's
 17 conclusory statements about routine practices by MetroPCS are inadmissible to prove Mr. Polhill
 18 ever received or accepted the T&Cs with an arbitration clause.”); *see also* Dkt. No. 33 at 3–4.
 19 Plaintiffs' arguments are unavailing. First, this case is distinguishable from *Johnson v. Stellar*
 20 *Recovery, Inc.*, No. 13-13829, 2014 WL 5705027 (E.D. Mich. Nov. 5, 2014), the main case on
 21 which they rely. In that case, the court found that Muzio's declaration failed to include details “as
 22 to any routine practice under which Plaintiff would have been presented with the Terms and
 23 Conditions.” *Id.* at *7. Here, however, Muzio's declaration offers specific context as to Metro's
 24 routine practices and procedures, including with respect to the sharing of the T&Cs upon

1 activation, the Metro Information Sheet, the Metro Box Sticker, and the text messages sent
 2 mentioning the arbitration agreement. Dkt. No. 15 at 3–5. Moreover, Plaintiffs do not contend that
 3 Muzio’s testimony regarding Metro’s routine practices “cannot be presented in a form that would
 4 be admissible in evidence.” Fed. R. Civ. P. 56(c)(2); *see also* Fed. R. Evid. 406, 803(6), 902(11);
 5 *Stratton v. Portfolio Recovery Assocs., LLC*, 706 F. App’x 840, 844 (6th Cir. 2017) (agreement
 6 between debtor and creditor was admissible despite lack of debtor’s signature on the agreement
 7 under Federal Rule of Evidence 803(6) where custodian attested to the routine procedures the
 8 creditor followed in obtaining a document from an original creditor); *Lopez v. Cequel Commc’ns,*
 9 *LLC*, No. 2:20-CV-02242-TLN-JDP, 2021 WL 5112982, at *3 & n.4 (E.D. Cal. Nov. 3, 2021)
 10 (finding admissible broadband provider employee’s declaration attesting to provider’s routine
 11 practices relating to its residential services agreement); *S.S. by & through Stern v. Peloton*
 12 *Interactive, Inc.*, 566 F. Supp. 3d 1019, 1045–46 (S.D. Cal. 2021) (finding admissible Peloton’s
 13 senior product manager’s declaration attesting to Peloton’s routine practices relating to its Terms
 14 of Service). Accordingly, the Court considers Muzio’s declaration.

15 (c) *T-Mobile Has Demonstrated Mutuality of Assent*

16 “Whether the parties have mutually agreed to be bound ‘is judged by an objective standard,
 17 looking to the express words of the parties and their visible acts, not their subjective states of
 18 mind.’” *Hergenreder v. Bickford Senior Living Grp., LLC*, 656 F.3d 411, 417 (6th Cir. 2011)
 19 (quoting *Kloian v. Domino’s Pizza L.L.C.*, 733 N.W.2d 766, 771 (Mich. Ct. App. 2006)). While a
 20 signed agreement shows mutual assent, the failure of one or both parties to sign a written
 21 agreement does not necessarily mean that a contract has not been formed. *Ehresman v. Bultynck*
 22 & Co., PC, 511 N.W.2d 724, 726 (Mich. Ct. App. 1994); *see also Sanchez v. Eagle Alloy Inc.*, 658
 23 N.W.2d 510, 517 (Mich. Ct. App. 2003) (“A meeting of the minds can be found from performance
 24 and acquiescence in that performance.”).

1 Considering Muzio's testimony regarding Metro's standard practice of delivering the
 2 T&Cs in multiple formats, and Polhill's corresponding conduct over a nine-year period—i.e.,
 3 purchasing multiple devices and services and never attempting to opt out—the Court finds that T-
 4 Mobile has met its initial burden of establishing that Polhill consented to the Metro T&Cs,
 5 including the arbitration agreement. *See, e.g., Tillman v. Macy's, Inc.*, 735 F.3d 453, 460 (6th Cir.
 6 2013) (finding in the employment context that plaintiff's "conduct following the communication
 7 of the offer objectively suggests that she accepted the arbitration agreement by continuing her
 8 employment without returning an opt-out form" because "[t]his performance mirrors that called
 9 for in the offer"); *Shye v. Bookspan LLC*, No. 1:21-CV-12285, 2022 WL 721525, at *5 (E.D. Mich.
 10 Mar. 9, 2022) (concluding that defendant met its initial burden where defendant's executive vice
 11 president submitted declarations attesting to defendant's relevant business practices of informing
 12 individuals that by signing up for its services, they would also be agreeing to defendant's terms
 13 and conditions); *Cuadras v. MetroPCS Wireless, Inc.*, No. CV-09-7897-CAS (AJWx), 2011 WL
 14 11077125, at *6 (C.D. Cal. Aug. 8, 2011) (holding that evidence of Metro's standard business
 15 practice of providing consumers with a copy of its T&Cs upon initiating service, "along with the
 16 fact that plaintiff activated lines of service on four separate occasions," was sufficient to satisfy
 17 Metro's initial burden of showing an agreement to arbitrate).

18 The Court next turns to whether Polhill has adequately disputed T-Mobile's proffered
 19 evidence of an agreement to arbitrate. In *Boykin v. Family Dollar Stores of Michigan, LLC*, the
 20 Sixth Circuit addressed the ways in which a plaintiff may establish a genuine dispute over whether
 21 he accepted an agreement to arbitrate. 3 F.4th 832, 839–40 (6th Cir. 2021); *id.* at 839 (identifying
 22 the "recurring question about what kinds of 'denials' create a genuine dispute of fact"). The court
 23 explained that "convenient memory lapses do not create factual disputes that are genuine," and
 24 that a party "cannot expect to obtain a trial under § 4 [of the FAA] simply by testifying that the

1 party does not ‘remember’ signing an arbitration contract or receiving information about
 2 arbitration.” *Id.* at 839–40. In contrast, “an ‘unequivocal denial’ that takes the form of admissible
 3 ‘evidence’ can create a genuine dispute of fact.” *Id.* at 840 (“[A] party might be able to obtain a
 4 trial under § 4 with a sworn denial that the party ever signed an arbitration agreement or received
 5 arbitration materials.”).

6 Although Polhill has submitted a sworn declaration, it is not an unequivocal denial that he
 7 ever received information about Metro’s arbitration clause. Rather, Polhill attests that he has never
 8 “knowingly” accepted an arbitration agreement, that he does not “recall receiving” the Metro
 9 T&Cs or Metro Information Sheet, or “recall seeing” the Metro Box Sticker “or other document
 10 mentioning arbitration when purchasing [his] phone[.]” Dkt. No. 20-1 at 2. He further avers that
 11 he “likely was not present” when the devices purchased in association with his account were taken
 12 out of the box. *Id.* And while he admits he received Metro’s text messages expressly referencing
 13 the T&Cs and arbitration, he has “no particular recollection” of receiving “other kinds of text
 14 messages” from Metro and has “never clicked on a link in a text message that claims to go to
 15 purported [T&Cs] for [his] service with Metro[.]” *Id.* at 3. These irresolute assertions fail to
 16 constitute the unequivocal denial required to establish a genuine dispute of fact. *See, e.g., Cuadras,*
 17 2011 WL 11077125, at *6 (“[N]o rational trier of fact would be able to find that plaintiff did not
 18 receive the T & Cs when she activated her lines of service.”).⁹

19 In sum, T-Mobile has shown that (1) Metro provided notice to Polhill that by activating or
 20

21 ⁹ Though Plaintiffs argue in opposition to T-Mobile’s motion that Polhill “never received notice of or a copy of the
 22 T&Cs or an arbitration agreement when he activated his service with MetroPCS/T-Mobile,” they cite to no evidence
 23 in the record either supporting that assertion or rebutting T-Mobile’s evidence of its policy and practice of providing
 24 the T&Cs as outlined in Muzio’s declaration. Dkt. No. 20 at 9. At one point Plaintiffs assert that Polhill “did not see”
 the Metro Box Stickers, *id.* at 12, but Polhill’s declaration states only that he does not “recall seeing” the Metro Box
 Stickers, Dkt. No. 20-1 at 2 (emphasis added). A party claiming that a fact is genuinely disputed must support that
 assertion by “citing to particular parts of materials in the record[.]” Fed. R. Civ. P. 56(c)(1)(A). Plaintiffs are warned
 that future misrepresentations of the evidence may result in sanctions.

1 continuing his service, he was consenting to the Metro T&Cs, and (2) he nevertheless remained a
 2 customer for nearly a decade, purchasing several devices without attempting to opt out of the
 3 arbitration agreement. *See Shye*, 2022 WL 721525, at *5 (“Under Michigan law, Plaintiff’s
 4 conduct demonstrates h[is] assent to the terms and conditions of the membership agreement.”).
 5 Furthermore, Polhill’s inability to recall whether he received the Metro Information Sheet, saw the
 6 Metro Box Sticker, or otherwise became aware of the Metro T&Cs qualifies as the type of
 7 “convenient memory lapse” that is insufficient to generate a dispute of fact. *Boykin*, 3 F.4th at 839.
 8 Further, Polhill’s failure to click on the link to the Metro T&Cs that he acknowledges receiving
 9 via text is similarly insufficient. *See In re StockX*, 19 F.4th at 882 (“It was plaintiffs’ duty to read
 10 the contract and obtain an explanation if they did not understand it.” (cleaned up)). Thus, the Court
 11 finds there was mutuality of assent regarding the arbitration agreement.

12 (d) *T-Mobile Has Demonstrated Mutuality of Obligation*

13 Next, Plaintiffs argue that T-Mobile has failed to meet its burden of establishing an
 14 agreement to arbitrate because the Metro T&Cs lack “mutuality of obligation” under Michigan
 15 law. Dkt. No. 20 at 13–14. Specifically, Plaintiffs aver that because “T-Mobile can unilaterally
 16 change what it contends is a contract, including the arbitration clause,” the T&Cs “cannot form a
 17 contract under Michigan law.” *Id.* at 14. The Court disagrees.

18 “Mutuality of obligation means that both parties to an agreement must be bound by the
 19 contract, or neither is bound.” *Eichinger v. Kelsey-Hayes Co.*, No. 09-14092, 2010 WL 2720931,
 20 at *6 (E.D. Mich. July 8, 2010); *see also id.* (“Where a contract obligates only one party to perform,
 21 while exempting the other party from any obligation to do so, it lacks mutuality and is void for
 22 want of consideration.” (cleaned up)); *Salita Promotions Corp. v. Ergashev*, No. 20-12547, 2021
 23 WL 3510967, at *8 (E.D. Mich. Aug. 10, 2021) (“The key feature of an illusory contract is that
 24 there is no mutuality of obligation.”). In this case, the arbitration clause binds both Metro and

1 Polhill. *See, e.g.*, Dkt. No 15-9 at 2 (“You and we each agree that, except as provided below, any
 2 and all claims or disputes in any way related to or concerning the agreement, our privacy notice,
 3 our services, devices or products, including any billing disputes, will be resolved by binding
 4 arbitration or in small claims court.” (emphasis and capitalization omitted)).

5 Plaintiffs are correct that the T&Cs outline Metro’s right to make changes to the agreement.
 6 However, Plaintiffs fail to show how these provisions create an illusory agreement or make Metro
 7 any less bound than Polhill. For example, the terms in effect at the time he signed up for service
 8 informed him that if T-Mobile made changes to the agreement, he would be “notified at least ten
 9 (10) days, unless a longer period is required, in advance of any proposed changes that may result
 10 in more restrictive terms or conditions in this Agreement,” and that he could “refuse to accept the
 11 changes” by notifying T-Mobile “within ten (10) days of the date of the change notice that [he]
 12 wish[ed] to terminate service.” Dkt. No. 15-1 at 7 (capitalization omitted). Similarly, the 2021
 13 T&Cs state as follows:

14 **CAN METRO BY T-MOBILE CHANGE OR TERMINATE MY SERVICES
 15 OR THIS AGREEMENT?**

16 Yes. We may change, limit, suspend or terminate your Service or this Agreement
 17 at any time . . . If the change to your Service or Rate Plan will have a material
 18 adverse effect on you, we will provide 14 days’ notice of the change. You’ll agree
 19 to any change by using your Service after the effective date of the change.

20 Dkt. No. 15-9 at 4–5. Therefore, the Court finds that T-Mobile has demonstrated mutuality of
 21 obligation. *See, e.g.*, *Salita Promotions*, 2021 WL 3510967, at *8 (“[A] right to amend does not
 22 render an agreement illusory when restrictions are placed on that right.” (internal quotation marks
 23 omitted) (quoting *Tobel v. AXA Equitable Live Ins. Co.*, No. 298129, 2012 WL 555801, at *4
 24 (Mich. Ct. App. Feb. 21, 2012))).

Having found that T-Mobile has satisfied its burden of establishing an agreement to
 arbitrate, the Court turns to Plaintiffs’ challenge to the enforceability of any delegation clause in

1 the Metro T&Cs. *See Caremark*, 43 F.4th at 1030.

2 4. The Scope, Validity, and Enforceability of the Metro Arbitration Agreement Must
 First Be Decided by an Arbitrator

3 As with the T-Mobile T&Cs, Plaintiffs argue that there is no clear and unmistakable
 4 evidence of delegation in the Metro T&Cs, and that any such purported agreement is
 5 unconscionable. Dkt. No. 20 at 14–19. For the same reasons discussed above in relation to Bennett,
 6 the Court disagrees.

7 (a) *Clear and Unmistakable Evidence of Delegation in Metro’s T&Cs*

8 As with Bennett, there is clear and unmistakable evidence of an intent to delegate disputes
 9 between Polhill and Metro as to arbitrability to the arbitrator.

10 First, the governing 2021 T&Cs explicitly state that “any and all disputes in any way related
 11 to or concerning” Metro’s agreement, services, devices, or products “will be resolved by binding
 12 arbitration[.]” Dkt. No. 15-9 at 2. Plaintiffs contend that language to this effect in the 2018 T&Cs
 13 “is not ‘clear and unmistakable’ because it is undercut when the agreement later provides that a
 14 ‘court of competent jurisdiction’ is in charge of finding a new arbitration administrator if Metro’s
 15 agreement will not be enforced ‘as written’ by the American Arbitration Administration.” Dkt. No.
 16 20 at 18; *see* Dkt. No. 15-6 at 3 (“If the arbitration administrator will not enforce this arbitration
 17 agreement as written, the parties shall agree on or mutually petition a court of competent
 18 jurisdiction to appoint a substitute arbitration administrator who will do so”). But such conditional
 19 language is not included in the governing 2021 T&Cs, *see generally* Dkt. No. 15-9, and even if it
 20 were, it in no way undermines or conflicts with the clear language delegating to the arbitrator
 21 disputes regarding the enforceability of the arbitration agreement.

22 Second, the T&Cs incorporate by reference the rules of the AAA. Dkt. No. 15-9 at 2; *see*
 23 *also* Dkt. No. 16-1 at 18 (Rule 14(a) of the AAA’s current Consumer Arbitration Rules). Plaintiffs
 24

1 claim that incorporation of the AAA's rules is insufficient to constitute clear and unmistakable
 2 evidence of the parties' intent to delegate gateway issues to the arbitrator. Dkt. No. 20 at 17
 3 ("Consumers cannot be expected to locate this reference to (future) arbitration rules, locate the
 4 current copy of the arbitration rules, find the specific rule governing the arbitrator's jurisdiction,
 5 and then understand its importance for questions of validity[.]"). But as noted above, the T&Cs'
 6 incorporation of the AAA rules "constitutes clear and unmistakable evidence" of such intent,
 7 *Brennan*, 796 F.3d at 1130, and "nothing in the Federal Arbitration Act purports to distinguish
 8 between 'sophisticated' and 'unsophisticated' parties," *Blanton v. Domino's Pizza Franchising
 9 LLC*, 962 F.3d 842, 851 (6th Cir. 2020).¹⁰ And like in New York and Washington, under Michigan
 10 law, a party to a contract is presumed to have read it, and "[i]t is well established that failure to
 11 read an agreement is not a valid defense to enforcement of a contract." *Montgomery v. Fid. &
 12 Guar. Life Ins. Co.*, 713 N.W.2d 801, 804 (Mich. Ct. App. 2005). Thus, the Court finds that as
 13 with the 2021 T-Mobile T&Cs, the broad arbitration agreement coupled with the incorporation of
 14 the AAA rules constitutes clear and unmistakable evidence of the parties' intent to delegate
 15 questions of arbitrability to an arbitrator. *DDK Hotels*, 6 F.4th at 318–19; *Blanton*, 962 F.3d at
 16 846.

17 Accordingly, the Court is required to enforce the Metro T&Cs according to their terms
 18 unless some other defense, such as unconscionability, applies. *Mohamed*, 848 F.3d at 1209.

19 (b) *Plaintiffs Fail to Show That the Metro T&Cs' Delegation Provision is
 20 Unconscionable*

21 Plaintiffs maintain that the delegation clause itself is procedurally and substantively
 22 unconscionable. Dkt. No. 20 at 18 ("Procedurally, the delegation clause was imposed on customers
 23

24 ¹⁰ Plaintiffs do not provide any characterization of Polhill's sophistication level, but the Court presumes for the sake
 of argument that he is an average consumer.

1 in the same coercive, deceptive process as the arbitration agreement itself. . . Substantively, the
 2 delegation clause is the source of many unconscionable provisions identified above with respect
 3 to the unconscionability of the arbitration agreement as a whole.”); *see also id.* at 14–15. T-Mobile
 4 asserts that despite referencing the delegation clause by name, Plaintiffs do not meaningfully
 5 challenge its operation and instead target the T&Cs in general. Dkt. No. 14 at 23–24 (“[W]hether
 6 the dispute resolution provision in the arbitration provision is ‘onerous’ or ‘unfair,’ as [Polhill]
 7 alleges, has no bearing on whether it is unconscionable to delegate arbitrability disputes to the
 8 arbitrator.”); *see also* Dkt. No. 21 at 14 (“[A] party cannot challenge a delegation clause based on
 9 the argument that a *different* procedural provision, like a pre-arbitration dispute resolution
 10 provision, is unconscionable.” (emphasis original)). In any event, T-Mobile argues that the
 11 delegation clause is not procedurally and substantively unconscionable. *See* Dkt. No. 21 at 13–16.

12 Under the Ninth Circuit’s recent holding in *Bielski*, the Court finds that Plaintiffs have
 13 lodged a proper unconscionability challenge to the delegation clause. 87 F.4th at 1011.¹¹ Even still,
 14 Plaintiffs do not demonstrate that the Metro T&Cs’ delegation provision is sufficiently
 15 unconscionable so as to render the clause unenforceable in this case.

16 For a contract or contractual provision to be considered unconscionable under Michigan
 17 law, “both procedural and substantive unconscionability must be present.” *Clark v.*
DaimlerChrysler Corp., 706 N.W.2d 471, 474 (Mich. Ct. App. 2005); *accord Lebenbom v. UBS*
Fin. Servs., Inc., 926 N.W.2d 865, 873–74 (Mich. Ct. App. 2018). “Procedural unconscionability
 19 exists where the weaker party had no realistic alternative to acceptance of the term,” and
 20 substantive unconscionability “exists where the challenged term is not substantively reasonable,”
 21 meaning “the inequity of the term is so extreme as to shock the conscience.” *Clark*, 706 N.W.2d
 22

24¹¹ The Court notes that T-Mobile submitted its briefing prior to the Ninth Circuit’s December 2023 decision in *Bielski*.

1 at 474–75. In this instance, for similar reasons addressed above in relation to Bennett, the Court is
 2 not persuaded by Plaintiffs’ unconscionability arguments that Polhill had no realistic alternative
 3 but to accept the delegation provision and that the delegation provision itself shocks the
 4 conscience. *See, e.g., Bielski*, 87 F.4th at 1013–15.

5 For example, Plaintiffs do not dispute that the T&Cs contain an opt out provision for the
 6 arbitration agreement, including the delegation clause, but instead argue that it is “practically
 7 impossible to comply with[.]” Dkt. No. 20 at 15 (“The provision makes it impossible for Mr.
 8 Polhill or other customers to opt-out because the opt-out deadline passes before the customer ever
 9 finds out about the arbitration agreement.”). However, Plaintiffs fail to support their assertion that
 10 the 30-day opt-out window (Dkt. No. 15-1 at 3) is procedurally unconscionable. *See, e.g.,*
 11 *Rodriguez*, 2023 WL 6593786, at *3 (“There is no oppression present here because although the
 12 contract is one of adhesion, the arbitration agreement clearly provided Plaintiffs with an option to
 13 opt-out of arbitration, and there is no indication that Plaintiffs lacked reasonable market
 14 alternatives such that there was an absence of meaningful choice.”); *Zawada v. Uber Techs., Inc.*, No.
 15 16-CV-11334, 2016 WL 7439198, at *6–7 (E.D. Mich. Dec. 27, 2016), *aff’d*, 727 F. App’x 839
 16 (6th Cir. 2018). And even if there were a basis to find a degree of procedural unconscionability,
 17 “there is nothing in the plain language of the arbitration clause that leads [the Court] to conclude
 18 that it is so extreme that it can be said to be substantively unconscionable.” *Lebenbom*, 926 N.W.2d
 19 at 874 (cleaned up). Moreover, as noted above, Ninth Circuit recently considered the “free peek”
 20 argument the Plaintiffs rely on and found that such provisions were not “overly harsh or unfairly
 21 one-sided.” 87 F.4th at 1015; *see also Barr v. HSS, Inc.*, No. 17-CV-12820, 2018 WL 8222120, at
 22 *8 (E.D. Mich. May 10, 2018) (finding similar arbitration process was not unconscionable), *report*
 23 *and recommendation adopted in relevant part*, 2018 WL 3545118 (E.D. Mich. July 24, 2018);
 24 *Eichinger v. Kelsey-Hayes Co.*, No. 09-14092, 2010 WL 2720931, at *7 (E.D. Mich. July 8, 2010)

1 (same).

2 Accordingly, the Court concludes that Polhill must also proceed to arbitration.¹²

3 **III. CONCLUSION**

4 For the foregoing reasons, the Court GRANTS T-Mobile's Motion to Compel Arbitration
5 and Stay Proceedings. Dkt. No. 14. The Court STAYS these proceedings pending arbitration. The
6 parties are DIRECTED to file a joint status report within ten days of the completion of arbitration
7 proceedings.

8 Dated this 22nd day of January, 2024.

9 
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11 Lauren King
12 United States District Judge
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¹² The parties do not appear to dispute that, to the extent Plaintiffs' claims are arbitrable, the T&Cs bar class arbitration.
Dkt. No. 15-9 at 3; Dkt. No. 27-5 at 7; *see Shivkov v. Artex Risk Sols., Inc.*, 974 F.3d 1051, 1067 (9th Cir. 2020).